United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1044

To be Argued by
DONALD L. KUBA

United States Court of Appeals

For the Second Circuit

Docket No. 74-1044

GEORGE J. WEINER, JR.,

Plaintiff-Appellant,

—against—

PAUL MATSCHINER, MICHAEL KULUKUNDIS, CALLIOPE KULUKUNDIS, DONALD L. KUBA, JOSEPH ROSENTHAL, RAM BROADCASTING CORPORATION, RAM BROADCASTING OF CALIFORNIA, INC., RAM BROADCASTING OF COLORADO, INC., RAM BROADCASTING OF CONNECTICUT, INC., RAM BROADCASTING OF FLORIDA, INC., RAM BROADCASTING OF INDIANA, INC., RAM BROADCASTING OF LOUISIANA, INC., RAM BROADCASTING OF MASSACHUSETTS, INC., RAM BROADCASTING OF MICHIGAN, INC., RAM BROADCASTING OF MISSOURI, INC., RAM BROADCASTING OF NEVADA, INC., RAM BROADCASTING OF NEW MEXICO, INC., RAM BROADCASTING OF OHIO, INC., RAM BROADCASTING OF OREGON, INC., RAM BROADCASTING OF SOUTH CAROLINA, INC., RAM BROADCASTING OF TEXAS, INC., and RAM BROADCASTING OF WASHINGTON, INC.,

Defendants-Appellees

CIVIL ACTION ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

WARSHAW, SYLVESTER, BURSTEIN & FRANKS
Attorneys for Defendants-Appellees
Matschiner, Rosenthal and Ram Companies
555 Fifth Avenue
New York, New York 10022
(212) 972-9100

DONALD L. KUBA,
CHARLES L. SYLVESTER,
Of Counsel

POLES, TUBLIN, PASTESTIDES & STRATAKIS
Attorneys for Defendants-Appellees
Michael and Calliope Kulukundis
37 Wall Street
New York, New York 10005
(212) WH 4-0580

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

United States Court of Appeals

For the Second Circuit

Docket No. 74-1044

GEORGE J. WEINER, JR.,

Plaintiff-Appellant,

—against—

PAUL MATSCHINER, MICHAEL KULUKUNDIS, CALLIOPE KULUKUNDIS, DONALD L. KUBA, JOSEPH ROSENTHAL, RAM BROADCASTING CORPORATION, RAM BROADCASTING OF CALIFORNIA, INC., RAM BROADCASTING OF COLORADO, INC., RAM BROADCASTING OF CONNECTICUT, INC., RAM BROADCASTING OF FLORIDA, INC., RAM BROADCASTING OF INDIANA, INC., RAM BROADCASTING OF LOUISIANA, INC., RAM BROADCASTING OF MASSACHUSETTS, INC., RAM BROADCASTING OF MICHIGAN, INC., RAM BROADCASTING OF MISSOURI, INC., RAM BROADCASTING OF NEVADA, INC., RAM BROADCASTING OF NEW MEXICO, INC., RAM BROADCASTING OF OHIO, INC., RAM BROADCASTING OF OREGON, INC., RAM BROADCASTING OF SOUTH CAROLINA, INC., RAM BROADCASTING OF TEXAS, INC., and RAM BROADCASTING OF WASHINGTON, INC.,

Defendants-Appellees.

CIVIL ACTION ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant appeals from the order of the District Court (Pierce, J.) filed on November 9, 1973 (A 22-34) and the separate judgment entered thereon on

December 5, 1973 (A 35-38) granting defendants-respondents' motion to dismiss Counts 1, 2, 3 and 4 of the complaint.

This is a diversity action. The parties concede that New York law governs.

Issues Presented

1. Was the District Court correct in dismissing the first three counts of the complaint as barred by the pertinent statutes of frauds?

2. In the alternative, although not relied upon by the Court below, could not the Court have dismissed the first three counts on the ground that plaintiff may not sue in his individual capacity.

3. Was the District Court correct in dismissing the second, third and fourth counts as barred by the pertinent statutes of limitations?

Pleadings

Plaintiff commenced this action on April 13, 1973. In substance, plaintiff alleges as a first count against defendants Paul A. Matschiner and Ram Broadcasting Corporation that in the latter part of 1965 plaintiff was employed by Matschiner as a technical advisor and consultant to guide Matschiner in his proposed entry into the communications business and in return Matschiner agreed to pay plaintiff for his services "five (5%) per cent of the capital stock of any corporation that said defendant would organize or cause to be organized to engage in the communications business" (A-5, Complaint ¶ 6) and that thereafter pursuant to the agreement, Matschiner did organize such a corporation, namely World Communications Corporation, a New York corporation, and that plaintiff received 15 shares of the World stock. It is further alleged that plaintiff fully performed his part of

the agreement and that in or about September 1969 Matschiner organized defendant Ram Broadcasting Corporation to engage in the communications business but that Matschiner and Ram have refused to issue to plaintiff any shares of Ram stock.

It will be noted that there is no claim that the parties entered into a written agreement.

The second count against defendants Matschiner, Ram, Michael Kulukundis and Calliope Kulukundis incorporates the material allegations of the first count and alleges that pursuant to the agreement plaintiff introduced Matschiner to "certain business opportunities", namely, expanding World's operations into the paging system and radio common carrier fields (A-8, Complaint ¶ 18), that Matschiner discussed these opportunities with defendant Kulukundis (A-8, Complaint ¶ 19) and that thereafter Matschiner and Kulukundis agreed to organize defendant Ram but schemed and conspired to conceal from plaintiff that Matschiner had a shareholder interest in Ram in order to deprive plaintiff of the shares of capital stock to which plaintiff was entitled under the aforesaid agreement. It is further alleged that to effectuate this alleged scheme of conspiracy all shares of the capital stock of Ram were issued to defendant Calliope Kulukundis but that Matschiner was in fact the owner of 50% of such issued stock and that defendants have failed to issue to plaintiff any shares of Ram stock.

The third count against defendants Matschiner, Michael Kulukundis and Calliope Kulukundis incorporates the allegations in count two and alleges that as a result of the fraudulent acts and conducts of these defendants, plaintiff has been deprived of an asset, namely shares of Ram stock having an estimated value of at least $200,000, and additionally claims consequential and punitive damages.

The fourth count pleads an action against defendant Matschiner alone for claimed violation of plaintiff's right of privacy under the New York Civil Rights Law § 51 in the alleged unauthorized use of plaintiff's name in "April 1968" (A-12, Complaint ¶ 36) in a Dun & Bradstreet report, resulting in damages to plaintiff for alleged injury to his professional reputation.

POINT I

The first three counts predicated on the breach of an alleged verbal agreement, are barred by the pertinent statutes of frauds.

The first three counts are predicated on the breach of alleged agreement whereby in consideration for consultant and advisory services in guiding defendant Matschiner into the communications business, defendant Matschiner would be continuously obligated to deliver to plaintiff "five (5%) per cent of the capital stock of any corporation that said defendant would organize or cause to be organized to engage in the communications business and of which he would be a shareholder." (A-5, Complaint ¶ 6) Plaintiff admits that the agreement was verbal (A-67, Pl. Brief pp. 2, 8) The agreement is patently within the purview of the statute of frauds both as an agreement involving the transfer of shares of stock and, as Judge Pierce ruled below (A-24), as an agreement which by its terms is not to be performed within one year from the making thereof.

A. Statute of Frauds, N.Y. Uniform Commercial Code § 8-319

Firstly, plaintiff fails because assuming the existence of an agreement involving the transfer of shares of stock it is unenforceable "unless there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of

described securities at a defined or stated price." *Bingham* v. *Wells, Rich, Greene, Inc.*, 34 App. Div. 2d 924, 311 N.Y.S. 2d 508 (1st Dept.), is in point. In that case the court held that a portion of an employment agreement which involved a transfer of title to shares of stock for a price is a sale of securities within the purview of § 8-319 and not enforceable without the requisite writing.

Plaintiff's verbal agreement clearly calls for the transfer of title to securities. The transaction contemplated the transfer of the securities for consideration. The contemplated transfer was for a "price". Section 2-304 of the Uniform Commercial Code states that "the price can be made payable in money or otherwise". In *Burnside & Co.* v. *Havener Securities*, 25 App. Div. 2d 373, 269 N.Y.S. 2d 724 (1st Dept.), the court held that the word "otherwise" is not limited in any way and "therefore it could include any consideration sufficient to support a contract." The performance of the purported consulting services constitutes the "price" within the meaning of the statute. See also 1 Williston on Sales, Fourth Edition 1973, § 6-4, Investment Securities at page 162. Hence, the count must fall for that reason alone.

B. Statute of Frauds, N.Y. General Obligations Law § 5-701 (1)

The first count must be dismissed for another reason. The District Court below held that the alleged agreement pleaded fell squarely within the New York General Obligations Law § 5-701 (1) as an agreement which by its terms was not to be performed within one year from the making thereof. (A-24-26) Similar verbal agreements have been held unenforceable in *Cohen* v. *Bartgis Bros. Co.*, 1st Dept. 264 App. Div. 260, 35 N.Y.S. 2d 206, aff'd. 289 N.Y. 849 and *Martocci v. Greater N.Y. Brewery*, 301 N.Y. 57. These cases are controlling and require dismissal of the complaint as a matter of law.

In *Cohen* v. *Bartgis Bros. Co.*, supra, the court deemed unenforceable a verbal promise to pay commissions "upon all orders placed by [a named customer] at any time, . . .". There the Appellate Division held:

> "We are mindful of the rule that contracts which admit of performance within a year, though unlikely to be thus performed, are not within the statute. . . . But the contract here is of a different character, for not only is it of indefinite duration but, by its terms, an obligation is imposed on the defendant which continues so long as the defendant and Resolute Paper Products Corp. exist.
>
> It is true that if Resolute Paper Products Corp. should place no orders with the defendant within the year no commissions would be earned, but the defendant's contract would not thereby have been 'performed,' for it would then apply to any orders that might be accepted in succeeding years. (2 Willison on Contracts, Rev. ed., sec. 500). Unlike contracts which require the performance of a single act which may or may not be executed within a year, the contract here requires the defendant, for an unlimited period of time, to pay commissions on orders accepted from Resolute Paper Corp. and, therefore, is impossible of performance within a year."

In *Martocci* v. *Greater N.Y. Brewery*, supra, the statute of frauds was held applicable to a promise to pay commissions without limit of time on all sales made to and paid for by the customer. Judge Froessel wrote (301 N.Y. at pg. 62):

> ". . . Since, however, the terms of the contract are such that the relationship should continue beyond a

> year, it is within the statute, even though the continuing liability to which defendant is subject is merely a contingent one. The endurance of defendant's liability is the deciding factor. The mere cessation of orders from [the customer] to defendant would not alter the contractual relationship between the parties; it would not constitute performance; plaintiff would still be in possession of his contractual right, though it may have no monetary value, immediately or ever."

The decisions emphasize the significance of the fact that the plaintiff had fully performed and that the accrual of liability to which the defendant is subject was a continuing liability, even though merely a contingent one. Plaintiff's reliance on *National Service Stations* v. *Wolf*, 304 N.Y. 332 is misplaced. There the court held each purchase and sale of gasoline resulted from a separate contract not within the scope of the statute of frauds. In the instant case the furnishing of a single consideration, namely introducing and guiding defendant Matschiner into the communications business was the generating source of the continuing duty to pay plaintiff 5% of the capital stock of each corporation in the communications business in which Matschiner was a shareholder, without any limit in point of time.

POINT II

The second and third counts alleging actions for the tort of inducing breach of contract which accrued in September 1969 are barred by the statute of limitations.

It is plaintiff's contention that the second and third counts

> "arise from the fact that the defendants MICHAEL KULUKUNDIS and CALLIOPE KULUKUNDIS conspired

> and agreed with the defendant MATSCHINER to conceal the fact of his ownership of shares of the defendant RAM BROADCASTING CORPORATION so as to delude me into believing that I was not entitled to receive 5% of the capital stock of the defendant RAM BROADCASTING CORPORATION." (A-72)

As stated by the court below regardless of the label applied by plaintiff, the second and third counts plead the traditional tort of inducing a breach of contract. (A-28)

The complaint at paragraph 9 alleges that defendant Ram Broadcasting Corporation was organized in September 1969 (A-6). Thus, plaintiff admits in his pleading that his cause of action accrued in September 1969.

New York CPLR Section 214 expressly provides that except as provided in Section 215 (one year) an "action to recover damages for personal injury" shall be commenced within three years (See N.Y. CPLR Section 214(4)). In *Rolnick* vs. *Rolnick*, 29 App. Div. 2d 987, 290 N.Y.S. 2d 111, affd. 24 N.Y. 2d 805, 300 N.Y.S. 2d 586, is was held that regardless of the label applied by plaintiff, the alleged cause of action was for the traditional tort of inducing a breach of plaintiff's employment agreement, and was barred by the three year statute of limitations. See *Posner Co.* v. *Jackson*, 223 N.Y. 325; *Hornstein* v. *Podivitz*, 254 N.Y. 443; *Hanrihan* v. *Parker*, 19 Misc. 2d 467, 192 N.Y.S. 2d 2; *Von Ludwig* v. *Schiano*, 23 App. Div. 2d 789, 258 N.Y.S. 2d 661.

The three year statute of limitations has been held applicable to all actions for inducing breach of contract even though the alleged wrongful acts inducing the breach may have been fraudulent in nature. *Polo* v. *Kibrick*, 120 N.Y.S. 2d 30 (Sup. N.Y. Co. Steuer, J.); *James L. Saphier Agency Inc.* v. *Green*, 190 F. Supp. 713, 725.

Inducing breach of contract is not a continuing tort. *Hagan Corp.* v. *Medical Society of New County*, 198 Misc. 207, 96 N.Y.S. 2d 286, affd. 279 App. Div. 1058, 113 N.Y.S. 2d 282.

Plaintiff in his own pleading admits that if any tort was committed, it was committed in 1969.

Accordingly, on the basis of plaintiff's own admissions, the second and third counts are barred by the three year statute of limitations under New York CPLR Section 214(4).

Plaintiff asserts that the statute is no bar because he has "duly performed". (A-73) The law is to the contrary. As the court below pointed out (26) full performance by one party of an oral agreement not to be performed within a year does not take it out of the statute of frauds. *Urvant* v. *Imco Poultry, Inc.*, 325 F. Supp. 677, aff'd. 440 F.2d 1355; *Rosen* v. *Greenfield Co.*, 269 N.Y.S. 2d 358, 359-60.

Moreover, since the second and third counts are bottomed on the alleged oral agreement pleaded in the first count which is voided by the statute of frauds, the second and third counts must also fall under the bar of the statute of frauds. *Dung* v. *Parker*, 52 N.Y. 495 at p. 500; *Subirana* v. *Munds*, 282 N.Y. 726, 728. (A-27,28)

POINT III

Since plaintiff pleads that corporations engaged in the communications business were intended as the agencies for carrying out the alleged course of dealing between plaintiff and defendant Matschiner, plaintiff may not sue in his individual capacity.

The first three counts of the complaint are framed to recover damages for breach of a 1965 verbal agreement whereby plaintiff was allegedly retained by defendant Mat-

schiner to guide him into the communications business and that plaintiff was to receive 5% of the capital stock of any corporation that defendant would organize or cause to be organized to engage in the communications business. It is further alleged that pursuant to the agreement plaintiff introduced Matschiner to certain business opportunities which in effect belonged to World Communications Corporation, that Matschiner discussed these opportunities with the other defendants and that defendants agreed to organize a corporation to enter into the radio common carrier field but schemed and conspired to conceal from plaintiff defendants' shareholder interest in the new corporation in order to deprive plaintiff of shares of capital stock. (A-7, 8, Complaint ¶s 6-7, 18-19)

Precisely the same allegations of diversion of business opportunities from World to Ram were the basis of a derivative action commenced in August 1970 by plaintiff and two other minority shareholders of World Communications Corporation. The derivative suit was determined adversely for plaintiff (A-45) and on appeal the Appellate Division, First Department unanimously affirmed the dismissal of the suit. *Niedermeyer* v. *World Communications Corp.*, —, App. Div. 2d —, N.Y.L.J., p. 2, col. 2, 2/1/74, motion for leave to reargue or in the alternative for leave to appeal to the Court of Appeals denied —, App. Div. 2d —, N.Y.L.J., p. 16, col. 2, 3/15/74. It is noteworthy that the instant action was commenced within 5 weeks of the dismissal of plaintiff's derivative suit. Compare paragraphs 18, 19 and 20 of the complaint at bar with paragraphs 6, 7, 8, 11, 15 and 22(f) of the derivative suit complaint. (A-52, 53, 54, 57).

It is clear that the existence of the corporations was not extrinsic to the claimed verbal agreement. It appears clearly from plaintiff's allegations that the corporations

were intended as the agencies and instrumentalities for carrying out the alleged course of dealing between plaintiff and defendant Matschiner. In *Boag* v. *Thompson*, 208 App. Div. 132, 135, 203 N.Y.S. 395, 398, it was said:

> "The plaintiff is a stockholder in these different corporations, and his own declaration is to the effect that, while there never was a copartnership, there existed what he terms a 'joint venture'. Even if this be so, the same rules of law apply to joint ventures as to partnerships. His only remedy, so far as I can see, is under the corporation laws of this State in an action by the corporation itself, or in a stockholder's action. He cannot be a stockholder and seek relief as a copartner or as a joint venturer, for surely he is either one or the other".

In *Manacher* v. *Central Coal Co.*, 284 App. Div. 380, 131 N.Y.S. 2d 671, the court stated that when

> "relief is sought on the ground that the corporation has become a mere agency or instrumentality for the performance of an independent agreement of joint adventurers or partners the aggrieved party is relegated to his rights as a stockholder and may not sue in his individual capacity."

In *Miglietta* v. *Kennicott Copper Corporation*, 25 App. Div. 2d 57, 266 N.Y.S. 2d 936, the complaint was framed to recover damages for breach of a written agreement for the exploitation of certain asbestos deposits. It was further alleged that the joint venture was to be merged into a corporation, that defendant did form such a corporation, the capital stock of which was issued 5% to plaintiff and 95% to defendants. The cause of action was predicated on allegations of lost corporate opportunities and act of waste allegedly in breach of the written agreement. The Court

held that plaintiffs' remedy for any such lost corporate opportunities would be limited to a derivative suit and dismissed the complaint.

POINT IV

The fourth cause of action predicated on alleged violations of plaintiff's right of privacy under Section 51 of the New York Civil Rights Law is barred by the statute of limitations.

Plaintiff's fourth count pleads an action for alleged violation of his right of privacy under the New York Civil Rights Law, Section 51. It is alleged that as a result of the unauthorized use of plaintiff's name in or about "April 1968", in a Dun & Bradstreet report of World Communications Corporation, plaintiff was fired by the New York Telephone Company on the ground of conflict of interest (A-12). Plaintiff admits that his cause of action accrued in April 1968 (A-75).

New York Civil Practice Law and Rules Section 215 expressly provides that an action to recover damages for "a violation of the right of privacy under Section 51 of the Civil Rights Law" shall be commenced within one year (See N.Y. CPLR Section 215(3)). The opinion of Judge Pierce succinctly answers Appellant's contentions. See also *Desmond* v. *20th Century Fox Record Corp.*, 36 App. Div. 2d 925, 321 N.Y.S. 2d 405 (1st Dept., 1971).

This is his exclusive remedy. He cannot convert such action into one of prima facie tort to avail himself of a longer statute of limitations. *Green* v. *Time, Inc.*, 147 N.Y.S. 2d 828, aff'd. 1 App. Div. 2d 665, 146 N.Y.S. 2d 812, aff'd. 3 N.Y. 2d 732, 163 N.Y.S. 2d 970; *Kamen* v. *United Press International, Inc.*, 33 Misc. 2d 903, 227 N.Y.S. 2d 776. Accordingly, plaintiff's request to replead count four

to avail himself of a longer statute of limitations is improper on its fact and was properly denied. (A-30)

Since the complaint is dated April 1973, 4 years after the acts upon which plaintiff bases his cause of action, the count was properly dismissed.

CONCLUSION

The judgment of the District Court dismissing the first, second, third and fourth counts of plaintiff's complaint pursuant to Rule 12(b)(6) of Fed.R.Civ.P. should be affirmed.

Respectfully submitted,

WARSHAW, SYLVESTER, BURSTEIN & FRANKS
Attorneys for Defendants-Appellees
Matschiner, Rosenthal and Ram Companies
555 Fifth Avenue
New York, New York 10022
(212) 972-9100

DONALD L. KUBA
CHARLES L. SYLVESTER,
Of Counsel

POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Defendants-Appellees
Michael and Calliope Kulukundis
37 Wall Street
New York, New York 10005
(212) WH 4-0580